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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 698

UNITED STATES OF AMERICA ex rel. TONY MARINO,

Petitioner,

vs.

RALPH H. HOLTON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, CHICAGO, ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Tony Marino, respectfully prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals, Seventh Circuit, affirming the order of the United States District Court, ordering the deportation of the petitioner, for the reasons hereinafter set forth:

(a)

The majority and dissenting opinions of the United States Court of Appeals in this cause have not as yet been published in the Federal Reports, but said opinions

are attached hereto as an appendix. The decision and findings of the District Court are likewise attached hereto as an appendix pursuant to Rule 23.

(b)

The opinion and judgment of the United States Court of Appeals, Seventh Circuit, affirming the order of the District Court dismissing the petition for a writ of *habeas corpus* filed by petitioner, were entered on December 6, 1955.

A petition for rehearing was denied January 6, 1956.

The jurisdiction of this Court is invoked on the following grounds:

(1) Under the Deportation Statute, 8 U.S.C.A. Sec. 1251, (a) (4) an alien may be deported if he "is convicted of a crime involving moral turpitude committed within five years after (his) entry." This case involves the question whether there is a legal conviction of record to support the deportation order. The majority opinion held there was a legal conviction. The dissenting opinion of Chief Judge Major held that the judgment of conviction upon which the deportation order was predicated was null and void, ineffective and "of no more force and effect than if it had been entered in the night time by the janitor of the county courthouse." (Part quoted are exact words from Judge Major's dissent.

(2) The majority decision of the Court of Appeals in this case is in direct conflict with the clear intent and meaning of the decision of this Court in *Marino* v. *Ragen,* 332 U.S. 561. The majority decision is also *sub silentio* in conflict with a decision of the the same Court of Appeals (different member) handed down recently in *U. S.* v. *Koplin,* 227 Fed. (2d) 80. The majority decision of the Court of

Appeals concludes that when petitioner was convicted of murder in 1925, he was accorded all of his constitutional rights. This Court, in *Marino* v. *Ragen,* 332 U.S. 561, at 563, said:

> "We conclude that petitioner was denied the due process of law which the Fourteenth Amendment requires."

And, again on page 565, this Court stated:

> "This case presents a flagrant example of deprivation of due process."

The language of this Court seems so clear that it is unbelievable that a Court could not comprehend it. As Chief Judge Major states in his dissent:

> "This unprecedented performance took place under the pretext that the court did not understand the mandate issued by the Supreme Court. Whatever infirmities might have resided in the mandate, it is hornbook law that a mandate must be construed in connection with the opinion or decision of the court of issuance. With the clear, distinct and direct language employed by the Supreme Court, it bears upon the preposterous to think that any Judge, any lawyer, in fact any layman, could have misunderstood the action called for by the mandate."

Yet, such an unconstitutional conviction is the basis for this entire deportation action against the petitioner.

(3) An illegal, unwarranted and unconstitutional miscarriage of justice will result and a very dangerous precedent will be created if the decision of the Court of Appeals is permitted to stand by this Court and the petitioner is deported. In the words of Chief Judge Major:

> "Stripped of all the window dressing with which this case abounds, there emerges the simple issue as to whether Marino was convicted, in violation of his constitutional rights, of a crime involving moral turpitude, to-wit, murder. That issue has been decided

in the affirmative by the Supreme Court of the United States. Such being the case, there never has been a lawful judgment of conviction standing against Marino. It is shocking that the Immigration and Naturalization Service should attempt to utilize such a conviction as a basis for deportation. I think that federal officials should renounce rather than embrace the grievous wrong which has been done Marino by Illinois officials."

(4) The construction of the Sixth and Fourteenth Amendments to the Federal Constitution by the majority of the Court of Appeals that the right of an accused to have the assistance of counsel does not require counsel to appear in Court to represent him is contrary to the decisions of this Court.

In the case at bar, in 1925 the petitioner Marino was eighteen years of age and could not speak, read, write or understand English. He had come from Italy less than two years before. The crime was committed February 20, 1925. Petitioner was arrested February 21, 1925 and was in jail continuously to the time he was sentenced, April 25, 1925. A lawyer by the name of North saw him in jail twice, February 28, 1925 and again on March 2, 1925, and talked to petitioner through an interpreter, but never saw him or appeared for him thereafter. Petitioner was not indicted *until April 21, 1925, seven weeks later.* At no time, at the arraignment, hearing or sentencing was any lawyer ever present to advise or consult with petitioner.

Yet, the majority opinion states:

"While it is customary for counsel for a defendant in a criminal case to appear in court, his appearance there merely indicates that he believes that he will thus further the interests of his client. Such appearance is not constitutionally indispensable. If competent, retained counsel, assisting defendant, believes

that a plea of guilty should be entered and sentence imposed in the manner in which it occurred in this case, there is no infringement of defendant's rights under the sixth or fourteenth amendments of the federal constitution."

This construction and opinion is directly in conflict with decisions of this Court on this subject.

(c)

The questions presented for review are:

(1) Is there a legal conviction of record upon which to predicate an order of deportation in this case?

(2) Did the Circuit Court of Winnebago County have the right or jurisdiction to ignore the decision of this Court in *Marino* v. *Ragen,* 332 U.S. 561, and instead of granting a new trial or discharging petitioner, hold an additional hearing as to whether petitioner had been deprived of due process on his original trial, when this Court had already decided that he had been deprived of due process?

(3) Are the Sixth and Fourteenth Amendments guaranteeing to an accused the right to assistance of counsel satisfied if no counsel appears in court for the accused at any stage of the proceedings and where accused has not had advice of counsel for seven weeks prior to his indictment?

(d)

8 U.S.C.A. Sec. 1251, (a)(4), page 358, provides:

"Any alien in the United States shall upon the order of the Attorney General, be deported who: * * * (4) is convicted of a crime involving moral turpitude committed within five years after entry and

either sentenced to confinement or confined thereafter in a prison or corrective institution, for a year or more."

(e)

STATEMENT OF THE CASE.

The petitioner, Tony Marino, an alien, was legally admitted to this country from Italy for permanent residence on November 11, 1923. (Trans. 114) (Because Marino was financially unable to provide a printed transcript of record, the Court of Appeals permitted us to use the original transcript of record on appeal. The original transcript has been filed in this Court.)

He was sixteen years old at the time. On February 20, 1925, he apparently shot one, Patterson, under circumstances not clear from the record. On February 21, 1925, he was arrested and remained in jail continuously until he was sentenced to life imprisonment for murder on April 25, 1925. Petitioner could not read, write, speak or understand English. A lawyer named North talked to him through an interpreter on February 28, 1925 and again on March 2, 1925. At no other time did Mr. North or any lawyer, consult with him nor did any lawyer ever appear in court for him.

On April 21, 1925, petitioner was indicted. On April 23, he was arraigned. No lawyer was present and apparently a plea of guilty was entered for him. On April 24, 1925, still without a lawyer present, the court heard evidence as to mitigating circumstances on his purported guilty plea. On April 25, 1925, a Saturday, the petitioner, still with no lawyer, was sentenced in open court to life imprisonment. (Trans. 60-65)

On January 6, 1947, after twenty-two years in the penitentiary, petitioner filed a petition for a writ of *habeas*

corpus in the Circuit Court of Winnebago County, Illinois, alleging *inter alia* that at the time of his arrest and trial in 1925 he was eighteen (18) years of age; that he did not at that time read, write, speak or understand the English language; that he did not sign a jury waiver and did not enter a plea of guilty; that he was without the advice of counsel; that impartial interpreters were not used; that he was denied a fair and impartial trial; that he was denied due process of law and that the judgment was void. The Circuit Court of Winnebago County quashed the writ and petitioner addressed a petition for a writ of certiorari to the Supreme Court of the United States. (Tr. 114).

The Attorney General of the State of Illinois filed a confession of error in the United States Supreme Court stating that no attorney appears to have been appointed for petitioner before he was sentenced to life imprisonment on April 25, 1925; that no plea of guilty ever appears to have been entered before the trial court in petitioner's trial and that it appears that the waiver on record purportedly signed by the petitioner was, in fact, not signed by him. (Tr. 161) The Attorney General's confession further stated that petitioner was only eighteen (18) years old at the time of his original trial, that he had entered the United States from Italy, his native land, only two years prior to his trial and that at the time of his trial he did not understand the English language and it is doubtful he understood American trial court procedure (Tr. 161); that it appears that Daniel Torreo, the person who appeared as interpreter for the petitioner at the original trial, was in fact the police officer who arrested the petitioner (Tr. 161); that Torreo testified at the *habeas corpus* hearing and stated that there was another interpreter by the name of Joseph Carrado, who explained to the

petitioner his rights but that the record fails to disclose Carrado as an interpreter (Tr. 161); that the facts in this case appear to be a more flagrant denial of due process than the facts in other cases where the court has held there has been a denial of due process of law.

The Attorney General of Illinois confessed error in these words:

> "The Attorney General therefore joins in asking this court to grant its writ of certiorari, confesses error, and consents that the judgment of the Circuit Court of Winnebago County may be reversed by this court without further brief, arguments or other proceedings in this cause.
>
> "The Attorney General is willing that this be done as soon as possible in order to correct a very evident failure of due process in petitioner's original trial." (Tr. 162)

This Court then stated in *Marino* v. *Ragen*, 331 U.S. 561, at 563:

> "The common-law record recites that petitioner was arraigned in open court and advised through interpreters of the meaning and effect of a plea of guilty and that petitioner signed a statement waiting jury trial and pleading guilty. He was sentenced to life imprisonment. It does not appear, however, that an attorney was appointed to represent him. The waiver was not in fact signed by him, and no plea of guilty was entered at the trial. He was 18 years old at that time and had been in this country only two years. He did not understand the English language and it is doubtful that he understood American trial court procedure. The arresting officer served as an interpreter for petitioner at the original trial.
>
> "The State of Illinois speaking through the Attorney General admits the foregoing facts, confesses error, and consents to a reversal of the judgment below."

The court then summarized, at page 563:

> "We conclude that petitioner was denied the due process of law which the Fourteenth Amendment requires."

Instead of granting a new trial as this Court apparently ordered, the Circuit Court of Winnebago County held a hearing to determine whether or not petitioner had received a fair trial originally. (Trans. 96, ff).

This was done although a full hearing had already been had. Twice this Court said in *Marino* v. *Ragen* that "after a hearing", the original writ was quashed by the Winnebago Court. The Attorney General in his confession of error spoke of a hearing. (Tr. 161) The Immigration Appeal Board also found that there had been a hearing. (Tr. 121)

Yet, the Winnebago Court, instead of granting a new trial, had a hearing to determine what the Supreme Court of the United States had already determined, namely, whether Marino had received a fair trial. The Winnebago Court found, as it had made up its mind to find in order to circumvent this Court's order that Marino had received a fair trial, stating:

> "I am of the opinion that all of the constitutional rights of the defendant were according to him." (Tr. 102)

He then quashed the writ of *habeas corpus* and remanded the petitioner to the penitentiary on May 17, 1948. (Tr. 115)

The Winnebago Court made his ruling despite an unprecedented motion by the Attorney General of Illinois that Marino be discharged. In the words of the Attorney General, which may well serve as our brief in this cause:

"(3) From a transcript of the proceedings had in this cause, the above mentioned confession of error, and the opinion of the Supreme Court of the United States, it appears that:

"Petitioner was indicted in this Court in the year 1925 for the crime of murder. He was illegally arrested in Wisconsin, illegally transported to Winnebago County, illegally held incommunicado for such a length of time that any purported confession made by him was illegally obtained, was arraigned upon said indictment, was at that time eighteen years of age and unable to speak the English language, and was not tendered counsel, nor did the court hold any hearing or proceedings in the nature of an inquiry as to whether he was competent intellectually to waive counsel; that one of the interpreters through whom his arraignment was conducted, was the police officer who took his confession while he was held incommunicado, as aforesaid, and that, thereupon, it being made to appear through the interpreter that the petitioner pleaded guilty, he was adjudged guilty of the crime of murder and sentenced to imprisonment for the rest of his natural life."

"(4) Upon these undisputed facts, the Supreme Court of the United States has declared this petitioner was convicted of murder and sentenced to life imprisonment upon such conviction in violation of his rights under the Constitution of the United States.

"In consequence of the premises, it became the duty of Max Weston, State's Attorney of Winnebago County, immediately upon the filing of the mandate aforesaid, to appear before this Court and move for the entry of a judgment order discharging the petitioner from the custody of the Warden of the Illinois State Penitentiary. Max A. Weston, State's Attorney, has failed and refused to do his duty in this regard.

"(5) The Attorney General of Illinois, on behalf of the People of the State of Illinois, makes this motion, not in the interests of petitioner as an individual, but because he considers that the violation of

the Constitutional rights of any person is tantamount to an attack on the rights and freedom of every inhabitant of the State of Illinois.

"Wherefore the People of the State of Illinois, by George F. Barrett, Attorney General of the State of Illinois, moves the Court to enter a judgment order in accordance with the mandate of the Supreme Court of the United States in this cause." (Tr. 155-156)

Thereafter, Marino, being again confined in the penitentiary, filed a series of contemporaneous petitions for mandamus, certiorari, etc., in the Supreme Court of Illinois and in this Court (336 U.S. 969) all of which were denied for technical reasons. (Tr. 115, 127, 130) By this time, the State of Illinois had already enacted its new Post-Conviction Act (August 4, 1949) and this Court undoubtedly wanted Marino to proceed for relief in the State Courts. On July 10, 1950, Marino was released on parole after serving twenty-five years. (Tr. 115)

The Immigration Authorities thereupon instituted action to deport him because he was "convicted" of this crime.

The deportation hearing officer in his report (Tr. 116) handed down September 12, 1951, found that petitioner was forty-four years of age, single, with no close relatives in the United States except an aunt and some cousins. His parents are deceased. He has no one dependent upon him for support. He is now employed as a checker for a transportation line and his average weekly earnings are $85.00. His assets then consisted of $1700.00 in bank deposits. (Tr. 116)

The hearing officer further stated in his report that he had no authority to exercise any discretionary grounds for relief which power is vested in the Attorney General of the United States. Accordingly, he recommended that petitioner be deported. (Tr. 116-118)

The cause was argued before the District Judge on February 17, 1955, on the petition and the return. No evidence was heard by him. (Tr. 139)

On March 17, 1955, the District Judge entered his findings of fact and conclusions of law and dismissed the petition for a writ of *habeas corpus*. (Tr. 140-144)

The essence of the Court's finding is "that the subsisting judgment of the Circuit Court of Winnebago County, State of Illinois, finding that the petitioner convicted of the crime of murder committed on February 20, 1925, is not subject to collateral attack in this proceeding." (Tr. 144)

A judgment order dismissing the writ of *habeas corpus* and remanding the petitioner to the Immigration Department for deportation was entered on March 14, 1955. Petitioner was permitted to remain at large by continuing the $1,000 bond pending the disposition of this appeal. (Tr. 145)

An appeal to the United States Court of Appeals followed. Then in a two to one decision, that Court affirmed the District Court.

This Petition for a Writ of Certiorari brings the matter up for review and decision by this Court. We respectfully submit that the decision of the Court of Appeals departs so widely from the decision of this Court in *Marino* v. *Ragen*, 332 U.S. 561, and from acceptable decisions and principles laid down by this Court that a review of this case is indispensable.

(g)

The Federal District Court has jurisdiction on *habeas corpus* to review deportation proceedings.

(h)

ARGUMENT AMPLIFYING REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

I.

Where the Supreme Court has found that a person convicted of a crime "was denied the due process of law which the Fourteenth Amendment requires", such finding is res adjudicata and binding upon the trial court, and such person is entitled to a trial de novo and not to a new hearing as to whether the Supreme Court finding is correct. Such a conviction is illegal and void and will not support a deportation order under 8 U.S.C.A. Sec. 1251 (a)(4), page 358.

Marino v. *Ragen*, 332 U.S. 561, 92 L. Ed. 170, 68 Sup. Ct. 240.

The majority on the Court of Appeals has emphasized every technicality, has indulged in every inference, and has adopted every assumption which might tend in any way to show that Marino received a fair trial in 1925. Even if this Court had not decided that Marino had not received a fair trial, the record, the more closely it is scrutinized, shows that he did not receive a fair trial.

No counsel was in court for him at any time. No conference with a lawyer was had from a period seven weeks before he was indicted to his sentencing. The arresting officer was the interpreter. No guilty plea appears on the common law record. These facts alone show how lacking in due process was his conviction.

But these facts are no longer open to dispute. The State of Illinois, through its Attorney General, admitted that his conviction was void and that he should be discharged or granted a new trial. This Court so found.

There had already been a full and complete hearing on the *habeas corpus* petition in the Circuit Court of Winnebago County. Surely, this Court would not remand the case for further hearing. As Judge Major points out in his dissent, it would be preposterous to do so. Yet, that is what the Winnebago Court did.

The majority opinion, in its zeal to support the Winnebago Court decision, makes the distinction that this Court in *Marino* v. *Ragen,* 332 U.S. 561, did not "reverse" the judgment but rather "vacated" the judgment and remanded the case. Surely, this Court will not sanction the deportation of an alien on a conviction branded as "a flagrant violation of due process" on the use of the word "reverse" instead of "vacate". Whichever word is used, the judgment affected cannot stand.

The majority opinion further invokes a new technical doctrine to sustain its position. The common law record reveals that no guilty plea was ever entered by Marino. But the Court says it would examine the docket of the trial judge and since the trial judge's docket shows a guilty plea, the record need not show it. In support of this argument, the majority opinion refers to *The People* v. *Nierstheimer,* 396 Ill. 193, 71 N.E. (2d) 157 and says that this Court denied certiorari in the latter case. 330 U.S. 841.

Of course, this Court denied certiorari in *People* v. *Nierstheimer,* 330 U.S. 841 because it involved the technical question of the validity of the *commitment order of the defendant to an insane asylum after judgment of conviction,* and did not even purport to involve the basic constitutional requirement of a plea of guilty or not guilty, which is a jurisdictional prerequisite to every conviction. We know of no case in any jurisdiction which

holds that a plea of guilty need not appear in the record and that it is sufficient if it appears in the personal notations or minutes of the trial judge. We can conceive of nothing more important than a clear and unequivocal record of a guilty plea, the effects and the entry of which are clearly explained to the accused through an unbiased interpreter *and* with the defendant's counsel in the courtroom. This admittedly did not occur at the original trial of Marino in 1925.

The majority of opinion interposes a further assumption that is not supported by the record. The majority opinion states that Judge Dusher found (at the second hearing), that Marino had the assistance of counsel; that friends of Marino had retained a Mr. North, "one of the best and most prominent lawyers in the northern part of Illinois"; that Mr. North's retainer continued until the sentencing of Marino.

Yet, the opinion concedes that Mr. North last visited Marino in jail on March 2, 1925; that he never saw Marino thereafter; that he never appeared in court for Marino at any time; that Marino was not indicted and arraigned until April 21, 1925 which is seven weeks after he last saw Mr. North; that the original trial judge knew that no lawyer was appearing for Marino; that the Court did not appoint a lawyer to advise Marino on April 21, 1925 or at any subsequent hearing. Is this representation by, advice of or assistance of counsel?

To escape from this dilemma, the majority opinion then states categorically that an actual court appearance of counsel is not necessary. In the case at bar and under the existing facts it was mandatory and the Attorney General of Illinois so admitted and this Court so found. *Marino* v. *Ragen*, 332 U.S. 561.

The majority opinion of the Court of Appeals then condoning the action of Mr. North, the lawyer, not appearing at any hearing, indulges in this fantastic assumption wholly *dehors* the record:

> "It may well have been that North, in considering the heinousness of the crime with which his client was charged, believed that the entry of a not guilty plea followed by a trial would result in a more severe punishment than what might be expected from a judge on a plea of guilty and a submission by the defendant personally to the mercy of the Court."

The fact is that Marino shot in self defense when one, Patterson, approached him with his hand on hip as if to pull a gun. There was nothing vicious, premeditated or heinous about this crime. Surely, the majority opinion in indulging in assumptions outside the record is injecting new facts in the record which emphasizes the unfairness of Marino's so-called trial. If this was such a heinous crime, why did not attorney North either appear or withdraw? Why did he not at least consult with Marino after March 2, 1925? Why did not the judge appoint or attempt to appoint a lawyer to represent Marino on April 21, 1925, April 23 or April 25, 1925, the date of the arraignment, the date of the hearing and the date of the sentencing, respectively? It was *less than four days from the indictment to the sentence.* We have cited the foregoing to show how far the majority opinion has gone astray to support Judge Dusher as against the Supreme Court of the United States. We submit that Chief Judge Major in his sharp dissent sets forth the true picture that Judge Dusher was determined that Marino must not get a new trial at all costs. Judge Major points out in his dissenting opinion:

> "Apparently, however, smarting under the castigation administered by one of the members of the Supreme Court, the state court refused to execute

the mandate. The action by that court which followed demonstrates not only a callous indifference to the decision of the Supreme Court but constitutes a scathing indictment of the honesty, integrity and good faith of the highest prosecuting official of the State. To the credit of the Illinois Attorney General, however, it should be noted that he, with courage and deference to the decision of the highest tribunal in the land, made a valiant effort to persuade the state court to follow and execute the mandate. No subterfuge was employed by that official as a pretext to do otherwise. As might be expected, he understood the decision of the Supreme Court, its mandate and what it called for."

No useful purpose would be served by pointing out in further detail how erroneous the majority opinion is. The decisive fact is that this Court found in *Marino* v. *Ragen*, 332 U.S. 561, that Marino was deprived of due process at his first trial. He was entitled to discharge or a new trial. He received neither. He merely received a further hearing to decide that this Court was wrong. Judge Dusher of the Circuit Court of Winnebago County, who was reversed by this Court, showed his utter defiance of the ruling of this Court when he was requested by the Attorney General of Illinois to discharge Marino in these words:

"I don't believe the law enforcement officers of the State of Illinois are quite as black as Mr. Rutledge painted them; neither do I think the law of Illinois is as bad as painted. The legislature had seen fit to establish a Board of Pardons & Paroles and if Marino has been punished more than he should have been, that is up to the Board of Pardons & Paroles but this court is required to follow the law as stated in the acts of the legislature and the decisions of the supreme court of Illinois and in the light of the mandate from the United States Supreme Court I think it is proper that this court inquire into

the entire matter and determine whether or not the attorney-general properly confessed error before the United States Supreme Court. "* * * Motion of the People of the State of Illinois for entry of judgment in accordance with the mandate of the Supreme Court heard and motion denied." (Tr. 151)

We respectfully submit that this Court found that Marino's conviction was in violation of due process and null and void. Therefore, there is no conviction of record and the deportation proceedings predicated upon such conviction must fall.

II.

Where an illiterate eighteen year old minor, unable to speak or understand English, is accused of a capital offense, and no lawyer represents him in court at any stage of the proceedings, and the last contact with a lawyer is more than six weeks before his indictment while incarcerated in jail, he has not received the right to have assistance of counsel guaranteed him by the Sixth Amendment, and a conviction obtained under such circumstances is null and void.

Hawk v. *Olson,* 326 U.S. 271, 276; 90 L. Ed. 61; 66 S. Ct. 116, 119.

Johnson v. *Zerbst,* 304 U.S. 458; 82 L. Ed. 1461; 58 S. Ct. 1019.

Von Moltke v. *Gillies,* 332 U.S. 708, 722; 68 S. Ct. 316, 322; 92 L. Ed. 309.

Powell v. *Alabama,* 287 U.S. 45, 69; 77 L. Ed. 158; 53 S. Ct. 55, 64.

Glasser v. *United States,* 315 U.S. 60, 76; 62 S. Ct. 457, 467; 86 L. Ed. 680.

United States v. *Koplin,* 227 Fed. (2d) 80, Seventh Circuit.

The majority opinion expounds one of the most dangerous and incredible theories in criminal law by saying that

the presence of counsel for the accused in the courtroom is not necessary and that the Sixth Amendment does not require it.

It is conceded that at no time in the trial court proceedings was Marino represented by counsel—either at the arraignment or at the trial or at the sentencing. In an extraordinary case, it is conceivable that an accused, who has the constant benefit of advice of counsel, and whose counsel is ill at some of the proceedings and therefore not in court, might not complain of this fact.

But, in the case at bar where an illiterate, ignorant minor, eighteen years old—accused of a capital offense, *has no counsel for seven weeks prior to the arraignment* and no lawyer represents him at any time in court, he cannot be said to have had assistance of counsel required under the Sixth Amendment.

This Court has spoken in no uncertain terms on the vital necessity to have adequate and competent counsel at all times. The words of this Court speak more eloquently than anything we can say.

Hawk v. *Olson,* 325 U.S. 271, 276; 90 L. Ed. 61; 66 S. Ct. 116, 119.

Johnson v. *Zerbst,* 304 U.S. 458; 82 L. Ed. 1461; 58 S. Ct. 1019.

Von Moltke v. *Gillies,* 332 U.S. 708, 722; 68 S. Ct. 316, 322; 92 L. Ed. 309.

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Glasser v. *United States,* 315 U.S. 60, 76; 62 S. Ct. 457, 467; 86 L. Ed. 680.

Indeed, this very Court of Appeals, in a recent case, *United States* v. *Koplin,* 227 Fed. (2d) 80, (speaking through Chief Judge Major, Judges Swaim and Platt concurring) reversed and remanded a judgment of con-

viction because the district judge forced a defendant to trial when his own counsel claimed to be engaged even though he appointed as the accused's attorney an associate of defense counsel.

The language and the decision of the Court of Appeals is contrary to the established law laid down by this Court and in conflict with decisions of the same Court of Appeals with different judges sitting. It is no wonder that we find Chief Judge Major in his dissent using such words as "unprecedented performance", "it bears upon the preposterous to think that any Judge, any lawyer, in fact any layman could have misunderstood the action called for by the mandate" of this Court, and "it is shocking that the Immigration and Naturalization Service should attempt to utilize such a conviction as a basis for deportation."

III.

Where the Attorney General of Illinois has filed a confession of error and the Supreme Court of the United States has accepted the confession of error as true, it is just as conclusive and binding on the parties as if the court has heard the case on evidence and a complete record.

Young v. *United States,* 315 U.S. 257; 62 S. Ct. 510; 86 L. Ed. 832, distinguished.

The Court of Appeals' majority opinion to sustain its decision states that after all this Court, in *Marino* v. *Ragen,* 332 U.S. 561, decided the case on the Attorney General of Illinois' confession of error and not upon a hearing of evidence. And the Court of Appeals cites *Young* v. *United States,* 315 U.S. 258, that a confession of error is not conclusive. Surely, this Court could have said, "We do not believe nor accept the Attorney General's confession of error." But this Court did accept it, relied upon it, and acted upon it. Once this Court ac-

cepted the confession of error, it is just as conclusive and binding on the parties as if the Court had heard thousands of pages of testimony. A judgment rendered on the pleadings or upon a stipulation of fact is just as binding as a judgment rendered in a case where fifty witnesses are heard. Chief Judge Major expressed this principle succinctly in his dissenting opinion:

> "Of course the Supreme Court and no other Court is bound to render a decision on a confession of error, or upon an agreement or stipulation of the parties, but when it does so its decision, so far as I am aware, carries no less weight than if it had been made on a complete record."

The majority opinion ignores the fact that there was a full hearing on the original habeas corpus petition before Judge Dusher in the Circuit Court of Winnebago County, Illinois. Twice in its opinion in *Marino* v. *Ragen*, 332 U.S. 561, this Court uses the words "after a hearing." It would have been absurd for this Court to remand the case for further hearings when a full hearing had already been had.

The majority opinion seeks sustenance in the fact that this Court on May 2, 1949 denied Marino's petition for certiorari seeking to review Judge Dusher's quashing the writ of *habeas corpus*. *Marino* v. *Ragen*, 336 U.S. 969.

But the reason why this Court denied certiorari was because Marino had not exhausted his remedies in the State Courts, and also because he had a remedy by appeal under the new Illinois Post Conviction Law. This Court has never passed upon the refusal of Judge Dusher to follow the mandate of this Court in 332 U.S. 561. The Court of Appeals' majority opinion in this case states:

"Justices Douglas, Murphy and Rutledge were of the opinion that certiorari should have been granted. They are the same justices who joined in a concurring opinion in *Marino* v. *Ragen,* 332 U.S. 561."

The majority opinion of the Court of Appeals draws an unwarranted conclusion from the foregoing. In denying certiorari in 336 U.S. 969, on Marino's petition, this Court, in effect, refused to act until Marino had exhausted his remedies under Illinois law. On the contrary, three justices were willing to grant certiorari even though he had not exhausted his remedies under Illinois law, and even though he was prematurely and improperly seeking relief in this Court.

The validity of the action of Judge Dusher in refusing to follow the mandate of this Court has never been directly in issue until this proceeding. This is the first time that this Court has had an appropriate opportunity to pass upon Judge Dusher's defiance of its mandate. The Court of Appeals has committed the gravest error in holding that there is a valid conviction of record when this Court has decided otherwise.

CONCLUSION.

The decision in this cause is contrary to the decision of this Court and to another decision of the same Court of Appeals (different members).

The dissenting opinion of Chief Judge Major is so vigorous and uncompromising because if the majority opinion is allowed to stand, it will completely change the the meaning of the Sixth Amendment and "advice and assistance of counsel" as interpreted by this Court. It will result in the grossest miscarriage of justice that has come

to our attention in more than a quarter of a century at the bar. It will encourage defiance of this Court's mandates.

The petitioner, Tony Marino, to be deported must have been lawfully convicted. On December 27, 1947, this Court decided in *Marino* v. *Ragen*, 332 U.S. 561, that his conviction was unlawful because he "was denied the due process of law which the Fourteenth Amendment required". Admittedly, he has never been re-tried since that date. Hence, there is no legal conviction of record. Any "further hearing" or other action by a court cannot change the record.

Petitioner therefore respectfully prays that a writ of certiorari issue forthwith to the United States Court of Appeals, Seventh Circuit, to bring this cause to this Court for review, and that upon such review the judgments of the said Court of Appeals and the District Court be reversed and the petitioner be discharged.

Respectfully submitted,

IRVING GOODMAN,

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EMIL CALIENDO and

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NATHAN B. ENGELSTEIN,

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